

A RESOLUTION

BY COUNCILMEMBER KWANZA HALL

06-R-

06-R-2247

A RESOLUTION AUTHORIZING THE MAYOR TO EXECUTE A RIGHT OF WAY MAINTENANCE AGREEMENT WITH THE GEORGIA DEPARTMENT OF TRANSPORTATION CONCERNING CERTAIN PORTIONS OF MORELAND AVENUE (STATE ROUTE 42), AND AN AGREEMENT WITH FREEDOM PARK CONSERVANCY, INC., TO ASSUME THE CITY'S OBLIGATIONS AS SET FORTH IN THE RIGHT OF WAY MOWING AND MAINTENANCE AGREEMENT; AND FOR OTHER PURPOSES.

WHEREAS, Moreland Avenue is a state route under the control of the Georgia Department of Transportation ("GDOT"); and

WHEREAS, GDOT has designed and plans to install physical improvements, including two new median islands in Moreland Avenue, at the intersection of Moreland Avenue and Freedom Parkway within GDOT's right of way, to improve pedestrian access.

WHEREAS, the GDOT design includes vegetative landscaping to be installed by GDOT as part of the installation of such improvements; and

WHEREAS, as a condition of allowing the installation of vegetative landscaping in the medians, GDOT requires that the City enter into a maintenance agreement for the landscaping to be installed in the medians; and

WHEREAS, in return for the City's agreement to enter into said agreement with GDOT, Freedom Park Conservancy, Inc., ("FPC") a non-profit corporation licensed to do business in the State of Georgia, has agreed to undertake the City's obligations under the landscape maintenance agreement, at no cost to the City; and

WHEREAS, the construction and maintenance of these medians is consistent with the City's transportation plan for this area.

NOW THEREFORE, be it resolved by the Council of the City of Atlanta as follows:

Section 1. That the Mayor is hereby authorized to execute on behalf of the City of Atlanta, a Right of Way Maintenance Agreement, substantially in the form attached as Exhibit A, provided that an agreement with a third party to undertake the City's obligation is first executed.

Section 2. That the Mayor is hereby authorized to execute on behalf of the City of Atlanta an agreement with Freedom Park Conservancy, Inc., that is substantially in the form attached as Exhibit B, and which will provide for Freedom Park Conservancy, Inc., to undertake the City's obligations under the Right of Way Maintenance Agreement as set forth in the document attached as Exhibit A.

Section 3. The City Attorney be and hereby is directed to negotiate, prepare and/or review the agreements necessary to effect the intent of this resolution provided that such agreements are in compliance with the conditions set forth herein and provided that there is no cost to the City.

STATE OF GEORGIA

COUNTY OF FULTON

RIGHT OF WAY MAINTENANCE AGREEMENT

By and Between

THE CITY OF ATLANTA

AND

FREEDOM PARK CONSERVANCY, INC.

THIS AGREEMENT made and entered into this _____ day of _____, 2006 by and between the CITY OF ATLANTA, a municipal corporation of the State of Georgia, and Freedom Park Conservancy, Inc., ("FPC") a non-profit corporation licensed to do business in the State of Georgia.

WITNESSETH

WHEREAS, Moreland Avenue is a state route under the control of the Georgia Department of Transportation ("GDOT"); and

WHEREAS, GDOT has designed and plans to install physical improvements, including two new median islands in Moreland Avenue, at the intersection of Moreland Avenue and Freedom Parkway within GDOT's right of way, to improve pedestrian access.

WHEREAS, Ecos Environmental Design, Inc. has designed vegetative landscaping to be installed by GDOT as part of the installation of such improvements; and

WHEREAS, as a condition of allowing the installation of vegetative landscaping in the medians, GDOT requires that the City enter into a maintenance agreement for the landscaping to be installed in the medians; and

WHEREAS, in return for the City's agreement to enter into such agreements with GDOT, FPC has agreed to undertake the City's obligations under the landscape maintenance agreement at no cost to the City; and

WHEREAS, the construction and maintenance of these medians is consistent with the City's transportation plan for this area; and

WHEREAS, Resolution, _____ adopted by the City Council on _____, 2006 and approved by the Mayor on _____, 2006

and made a part hereof by reference, authorized the Mayor to enter into this agreement with FPC under the terms specified herein; and

NOW THEREFORE, for and in consideration of the mutual agreements between the parties hereinafter, and for other good and valuable consideration, the parties hereto do agree as follows:

1.

STATEMENT OF AGREEMENT

The City of Atlanta ("City") and Freedom Park Conservancy, Inc. (FPC) hereby agree that, as a condition for the City agreeing to enter into a Right of Way Maintenance Agreement for Moreland Avenue at the intersection of Freedom Parkway with the Georgia Department of Transportation (the "Maintenance Agreement"), FPC will perform the obligations which the City has agreed to perform pursuant to the Maintenance Agreement which is attached as Exhibit A.

2.

THE EFFECT OF THE MAINTENANCE AGREEMENT

FPC stipulates that it is aware of and has fully reviewed the Maintenance Agreement entered into or to be entered into between the City and GDOT which is attached as Exhibit A. In any case where the terms of this Agreement may be interpreted or construed to require a lesser obligation of FPC to the City than the obligations of the City to GDOT as set forth in the Maintenance Agreement, the terms of the Maintenance Agreement shall be considered as further clarifying and explaining the obligations of FPC in this Agreement unless it is specially stated in this Agreement that such variation in obligations is permitted. FPC agrees that to the greatest extent possible, its obligations performed under this Agreement should be construed to be equal to the obligations of the City to perform under the Maintenance Agreement.

- a. Under no circumstances shall the City be obligated to supply any funds to complete any portion of the work described in the Maintenance Agreement or satisfy any claims of FPC or any claims of any other person or persons made upon FPC in connection with the work performed by FPC pursuant to this Agreement.
- b. Should GDOT terminate the Maintenance Agreement for any reason, FPC agrees that all landscaped areas covered by this Agreement shall be left in a condition which is not hazardous to the health, safety and welfare of the City and the public and which does not unreasonably impede the flow of vehicular traffic.
- c. This Agreement is being executed with full knowledge that the Maintenance Agreement may or may not have been fully executed at the time of execution of this Agreement. The obligations of FPC under this

Agreement shall be binding on FPC as of the time of full execution of the Maintenance Agreement, provided that the Maintenance Agreement that is executed matches Exhibit A in all material respects.

3.

TIME OF PERFORMANCE

FPC shall commence the performance of its obligations pursuant to the terms of this Agreement no later than thirty (30) calendar days after execution of the Maintenance Agreement by each of the parties thereto.

4.

PROFESSIONAL RESPONSIBILITY

FPC shall assume all responsibility undertaken by the City in the Maintenance Agreement with respect to the professional quality of those tasks required by the Scope of Work set forth in the Maintenance Agreement (the "Project").

5.

NO COMPENSATION PAID COSTS NOT FUNDED BY DEPARTMENT OF CITY

FPC and the City hereby acknowledge and agree that the Maintenance Agreement contains no provisions for compensation or cost reimbursement to be paid to the City by GDOT.

- a. FPC acknowledges and agrees that it will not be paid by the City or GDOT for the work to be done under this Agreement and/or the Maintenance Agreement.
- b. FPC agrees that it will bear all costs or pay all expenses necessary to complete the Project or fulfill the obligations set forth in this Agreement.
- c. FPC acknowledges and agrees that Resolution _____ does not authorize the City to commit funds to the Project. All costs and expenses necessary to complete the Project and to fulfill the requirements of this Agreement are solely the responsibility of FPC.
- d. In the event of termination of the Project by GDOT, the obligations of FPC are governed by Paragraph 2, subpart b of this Agreement.

6.

RIGHT OF INSPECTION AND APPROVAL OF WORK

The City and GDOT shall have the right to inspect any part of work performed under this Agreement. FPC acknowledges and agrees that the performance of the Scope of Work must satisfy all City ordinances in addition to any requirements of GDOT under the Maintenance Agreement.

7.

NO ASSIGNMENT

The rights and obligations set forth in this Agreement may not be assigned, sublet, or transferred without prior written permission of the City.

8.

INSURANCE

During the term of the Maintenance Agreement and this Agreement, FPC shall maintain insurance in full force and effect and shall, upon request, furnish to the City certificates of insurance evidencing such coverage. The City shall be named as an additional insured in each policy related to the Project. The following types of insurance shall be required:

General Liability Insurance in an amount of not less than \$1,000,000 Bodily Injury and Property Damage combined single limit.

9.

INDEMNIFICATION

FPC acknowledges that the Maintenance Agreement between GDOT and the City obligates the City to GDOT in various respects for the maintenance of certain landscaping installed at the intersection of Moreland Avenue and Freedom Parkway and FPC agrees to the maximum extent allowed by law to assume all of the obligations and responsibilities of the City under the Maintenance Agreement except where the City specifically assumes an obligation or responsibility under this Agreement. FPC further agrees to indemnify the City with respect to any and all claims, losses or expenses which the City may incur with respect to those obligations or responsibilities, which FPC has agreed to assume pursuant to this Agreement. The language of this general assumption of obligation and responsibility and general indemnity shall not be construed to waive or supersede any previous language of this Agreement, which more specifically describes any other assumption of responsibility or obligation or indemnification, but shall be construed to supplement those specific assumptions of responsibilities and obligations or indemnifications. The language of this general assumption of responsibility or obligation and general indemnity shall be construed in the broadest sense to include all

parts of the Maintenance Agreement under which FPC has assumed any responsibility or obligation and includes as a part of the indemnity, an agreement by FPC to reimburse the City for the payment of all claims, expenses, costs arising from or in respect to the Maintenance Agreement. FPC acknowledges and agrees that all agreements for indemnity provided by this Agreement shall survive its termination.

10.

NOTICES TO THE PARTIES

The City appoints as its designated representative for the receipt of notices, submittals, or other communications, David E. Scott, Commissioner of Public Works, or any successor, whose address for the purpose of this Agreement shall be:

David E. Scott, Commissioner of Public Works
Department of Public Works
55 Trinity Avenue, S.W, Suite 4700
Atlanta, GA, 30303-3520
404-330-6240
 (fax)

Notice to FPC shall be provided to:

Andrea L. Rimer
Troutman Sanders LLP
600 Peachtree Street, Suite 5200
Atlanta, GA 30308
404-885-3265
404-962-6669 (fax)

All notices, submittals or other communications shall be made to the designated representative in writing and delivered by: (a) hand delivery at the address indicated herein; (b) United States Certified Mail - Return Receipt Requested, postage prepaid; or (c) by Facsimile immediately followed by a confirmation call. The day upon which such notice is hand delivered or faxed and confirmed shall be deemed the date of service of such notice if delivered by such means. The date of signature on the Return Receipt or the date of refusal shall be deemed the date of service of such notice if delivered by United States Certified Mail. Either party may change its designated representative by notice to the other as provided herein or may name other persons as sub-designees for the receipt of specific types of materials, such as engineering plans, blueprints or other voluminous documents, provided however that the designated representative shall always receive a simultaneous notice describing the type material which is sent to any sub-designee

11.

COMPLIANCE WITH CITY ORDINANCES

It is specifically agreed that none of the terms of this Agreement excuse, modify or waive compliance with any City ordinance.

12.

PERMITS AND LICENSES

In connection with the performance of the services called for by this Agreement, FPC shall obtain, at its own expense, all permits and all licenses required by all municipal, state and federal authorities, now required to be in force, or which may hereafter, be required to be in force. **[Are any City permits or licenses required?]**

13.

GENERAL PROVISIONS OF THIS AGREEMENT

- a. The brief capitalized and underlined headings or titles preceding each paragraph are for purposes of identification, convenience and ease of reference, and shall be disregarded in the construction of this Agreement.
- b. No failure of either party hereto to exercise any right or power granted under this Agreement, or to insist upon strict compliance by the other party with this Agreement, and terms and conditions of this Agreement, shall constitute a waiver of either party's right to demand exact and strict compliance by the other party hereto with the terms and conditions of this Agreement.
- c. This Agreement shall be governed by, construed under, performed and enforced in accordance with the laws of Georgia.
- d. Should any provision of this Agreement require judicial interpretation, it is agreed and stipulated by and between the parties that the court interpreting or construing the same shall not apply a presumption that the terms, conditions, and provisions hereof shall be more strictly construed against one party by reason of the rule of construction that an instrument is to be construed more strictly against the party who prepared the same.
- e. The termination of this Agreement shall not operate to cut off any claims or causes of action in favor of either party which occurred or arose prior to the effective date of such termination.
- f. Any agreement between FPC and any other person shall specify that the City shall have the right to enforce the terms of the agreement without the consent of FPC and that the obligations of any person under any agreement with FPC shall survive the termination of the existence of this Agreement and/or the termination of the existence of FPC.

ENTIRE AGREEMENT

This Agreement supersedes all prior negotiations, discussions, statements and agreements and constitutes the full, complete and entire agreement between the parties with respect to the terms of the Agreement; no member, officer, employee, representative or agent of either party has authority to make, or has made, any statement, agreement, representation to make, or has made, any statement, agreement, representation or contemporaneous agreement, oral or written, in connection herewith, amending, supplementing, modifying, adding to, deleting from, or changing the terms and conditions of this Agreement. No modification of or amendment to this Agreement shall be binding on either party hereto unless such modification or amendment shall be properly authorized, in writing, properly signed by both parties and incorporated in and by reference made a part hereof. Any subsequent amendments to the Maintenance Agreement shall be binding on FPC only to the extent FPC has agreed in writing to accept the responsibility for such amendment as part of this Agreement.

IN WITNESS WHEREOF, said parties have hereunto set their hand and affixed the seals.

CITY OF ATLANTA

Municipal Clerk (Seal)

By: _____
Shirley Franklin, Mayor

RECOMMENDED

Commissioner, Department of
Public Works

APPROVED

Chief Financial Officer

APPROVED AS TO FORM

City Attorney

Kwanza Hall

From: Stefanie D. Grant
Sent: Wednesday, September 27, 2006 6:00 PM
To: Kwanza Hall
Subject: Moreland/Freedom Park Refuge Islands
Attachments: Resolution to Authorize GDOT& FPC Maintenance Agreement.DOC; FPC Moreland Crosswalk_Agreement w_City of Atlanta.DOC

Jay,

As we discussed, the Freedom Park Conservancy (FPC) should have, or shortly will be, seeking Council Member Hall's assistance in sponsoring a resolution to authorize two agreements.

The first agreement is a Maintenance Agreement between the City of Atlanta and the Georgia Department of Transportation. The agreement allows GDOT to install a planted median, rather than a concrete median, at the intersection of Moreland and Freedom Parkway, and for the City to agree to maintain that median.

The second agreement is what we call a "pass-through agreement" wherein the City passes all of its obligations in the first agreement, on to a third party; in this case, FPC. As I explained via telephone, the City is involved because GDOT will not contract directly with FPC, thus FPC needs the City to sponsor it's ability to maintain the median. It all seems so incredibly complicated when all FPC wants to do is have plants in the median rather than concrete!!

I have attached the legislation which would authorize both agreements, and as is council's preference, I have attached both agreements as well. As you already know, I will be out of the office until Tuesday. If the Councilman has ANY reservations about introducing the resolution on Monday, please do not hesitate to hold off until he can discuss this with me when I return to the office. Thanks so much for your help.

Stefanie D. Grant
Sr. Assistant City Attorney
City of Atlanta Department of Law
68 Mitchell Street, S.W.
Atlanta, Georgia 30303
office: 404-330-6400
fax: 404-658-7980

10/2/2006